

Andre' Giovanni ak Griffin v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
B-05-4-01 OF 2015
TENGKU MAIMUN, ZAKARIA SAM AND AHMADI ASNAWI JJCA
30 MAY 2017

Evidence — Judge — Failure to consider all evidence — Police party who raided appellant's room in condominium unit found large amount of cannabis in cupboard — Trial judge convicted appellant of trafficking after finding appellant had custody/control over the room, the cupboard and the cannabis — Whether trial judge erred in not considering evidence of appellant's subtenant who corroborated appellant's evidence that room was shared by another person and was also frequented by appellant's girlfriend — Whether failure to consider subtenant's evidence serious misdirection that rendered appellant's conviction unsafe and liable to be set aside

The High Court had sentenced the appellant, a college student, to death after finding him guilty of two charges of drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952. One charge was for trafficking in 1,863g of cannabis on the road in front of a condominium block; the other, was for trafficking in 953g of the same drug in one of the units in the condominium rented by the appellant. According to the prosecution's evidence, a police party lying in ambush had stopped the appellant as he was walking out of the condominium block carrying a bag ('P23'). On searching the bag, the police found in it the 1,863g of cannabis besides the appellant's identity card, driving licence and a bank card. The appellant then led the police party to his rented unit where another 953g of cannabis was recovered from a cupboard in a room occupied by the appellant. At the time, the appellant's subtenants, a man ('SP2') and a woman, were in their adjoining room. In his defence, the appellant had said that he shared his room with another person named Joe whose belongings were also in the cupboard where the cannabis was found. Prior to Joe moving in to the room, the appellant said his then girlfriend, Nora, used to stay with him in the room at least four days in a week. The appellant said on the day he was arrested he was with Joe in his room when Joe requested him to go down and hand P23 over to a woman who was waiting for it in a car outside the condominium block. The appellant did as he was asked but when he neared the car he was arrested by police. The appellant maintained that he did not know about the drugs either in P23 or in the cupboard in his room. The trial court ruled that the prosecution had proven the appellant's possession of the cannabis by direct evidence, independent of any statutory presumption, as he had custody, control and possession of P23 when he was arrested and also

- A had control of the cupboard in his rented unit. Given the amount of the drugs involved, the trial court held that it was reasonable to infer the appellant was trafficking in the cannabis. The instant appeal was against the High Court's decision.
- B **Held**, affirming the conviction and sentence on the charge of trafficking in 1,863g of the cannabis, setting aside the conviction and sentence on the charge of trafficking in 953g of cannabis and acquitting and discharging the appellant of that charge:
- C (1) The conviction in respect of the charge of trafficking in 1,863g of cannabis was safe as the evidence on that charge against the appellant was overwhelming. The ruling by the trial judge was clear, that mens rea possession had been proven by direct evidence and due to the large amount of drugs found in the bag, the presumption of trafficking under s 37(da) was invoked (see paras 57 & 62–63).
- D (2) The conviction and sentence in respect of the second charge of trafficking in 953g of cannabis could not stand and had to be set aside and the appellant acquitted and discharged of that charge (see para 71).
- E (3) In the assessment of the appellant's defence on the second charge, the trial judge failed to consider SP2's evidence wherein many parts of his evidence spoke in favour of the defence, especially (a) that the appellant's room was accessible to both Nora and Joe; that Nora had slept over in the room on weekdays and weekends; that her clothes and make up set were in the room and her passport was found in the cupboard; and (b) that Joe had the keys to both the condominium unit and the room; that Joe was supposed to move in and had brought a few bags of things to the appellant's room; and that on the morning of the day of the police raid, SP2 had seen and spoken to Joe. SP2 was an important witness. His evidence strongly corroborated the appellant's defence that others had access to the room and, as such, could have concealed the cannabis in the shoe-box. The trial judge erred when he said the appellant had custody of the room, the cupboard and the cannabis. He erred in not giving any weight to SP2's evidence at all. This non-direction amounted to a serious misdirection. The trial judge also failed to recognise that the prosecution had excluded both Joe and Nora in order to pin possession on the appellant (see paras 67–70).
- F
- G
- H

[Bahasa Malaysia summary]

- I Mahkamah Tinggi telah menjatuhkan hukuman mati ke atas pelajar kolej selepas mendapati dia bersalah terhadap dua tuduhan mengedar dadah di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Satu tuduhan adalah kerana mengedar kanabis seberat 1,863g di atas jalan di hadapan blok pangsapuri yang disewa oleh perayu. Mengikut keterangan pihak pendakwaan, sepasukan polis

yang bersedia untuk menyerbu telah memberhentikan perayu semasa dia sedang berjalan keluar daripada blok pangsapuri membawa beg ('P23'). Dalam mengeledah beg tersebut, polis mendapati di dalamnya kanabis seberat 1,863g disebelah kad pengenalan perayu, lesen memandu dan kad bank. Perayu kemudiannya membawa pasukan polis tersebut ke unit yang disewanya di mana kanabis seberat 953g lagi diperolehi daripada almari di dalam bilik yang dihuni oleh perayu. Pada masa tersebut, penyewa kedua perayu, seorang lelaki ('SP2') dan seorang perempuan, berada dalam bilik bersebelahan mereka. Dalam pembelaannya, perayu telah menyatakan yang dia berkongsi biliknya dengan orang lain yang bernama Joe yang mana barangnya juga berada di dalam almari di mana kanabis diperolehi. Sebelum Joe pindah masuk ke bilik tersebut, perayu menyatakan yang teman wanitanya ketika itu, Nora, pernah tinggal dengannya di dalam bilik tersebut sekurang-kurangnya empat hari seminggu. Perayu menyatakan bahawa pada hari dia ditangkap dia berada dengan Joe di dalam biliknya apabila Joe menyuruh dia untuk turun ke bawah dan menyerahkan P23 kepada seorang wanita yang sedang menunggu untuk barang tersebut di dalam kereta di luar blok pangsapuri. Perayu membuat apa yang disuruh tetapi apabila dia menghampiri kereta tersebut dia ditangkap oleh polis. Perayu mengekalkan yang dia tidak mengetahui mengenai dadah sama ada di dalam P23 atau di dalam almari di dalam biliknya. Mahkamah perbicaraan memutuskan bahawa pihak pendakwaan telah membuktikan pemilikan kanabis tersebut oleh perayu melalui keterangan langsung, bebas daripada anggapan statutori, kerana dia mempunyai jagaan, kawalan dan milikan terhadap P23 apabila dia ditangkap dan juga mempunyai kawalan terhadap almari di dalam unit yang disewanya. Dengan jumlah dadah yang terlibat, mahkamah perbicaraan memutuskan bahawa ia adalah munasabah untuk membuat inferens bahawa perayu mengedar kanabis tersebut. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, mengesahkan sabitan dan hukuman ke atas tuduhan mengedar kanabis seberat 1,863g, mengenyahkan sabitan dan hukuman ke atas tuduhan pengedaran kanabis sebanyak 953g dan melepaskan dan membebaskan perayu terhadap tuduhan tersebut:

- (1) Sabitan berkaitan tuduhan mengedar kanabis seberat 1,863g adalah selamat kerana keterangan atas tuduhan tersebut terhadap perayu adalah amat besar. Perintah oleh hakim perbicaraan adalah jelas, milikan mens rea tersebut jelas dibuktikan oleh keterangan langsung dan akibat kepada jumlah besar dadah tersebut dijumpai dalam beg, anggapan pengedaran di bawah s 37(da) dibangkitkan (lihat perenggan 57 & 62–63).
- (2) Sabitan dan hukuman berkaitan tuduhan kedua mengedar kanabis sebanyak 953g tidak dapat dipertahankan dan perlu diketepikan dan perayu dilepaskan dan dibebaskan terhadap tuduhan tersebut (lihat perenggan 71).

- A (3) Dalam penilaian pembelaan perayu atas tuduhan kedua, hakim perbicaraan gagal untuk mempertimbangkan keterangan SP2 di mana banyak bahagian keterangannya memihak pembelaan, terutamanya
- B (a) bahawa bilik perayu boleh diakses oleh Nora dan Joe; bahawa Nora tidur di bilik tersebut pada hari minggu dan hujung minggu; bahawa pakaian dan set make upnya berada di dalam bilik tersebut dan pasportnya dijumpai di dalam almari; dan (b) bahawa Joe mempunyai kunci kepada kedua-dua unit pangsapuri dan bilik tersebut; bahawa Joe sepatutnya berpindah dan membawa beberapa beg barang ke bilik perayu; dan bahawa pada waktu pagi hari yang diserbu oleh pasukan polis tersebut, SP2 telah dilihat dan bercakap dengan Joe. SP2 adalah saksi yang penting. Keterangannya jelas menyokong pembelaan perayu bahawa orang lain mempunyai akses kepada bilik tersebut, dengan demikian, boleh menyembunyikan kanabis dalam kotak kasut tersebut.
- C Hakim perbicaraan tersilap apabila beliau menyatakan bahawa perayu mempunyai penjagaan bilik, almari dan kanabis. Beliau tersilap kerana langsung tidak memberi apa-apa berat kepada keterangan SP2. Ketidadaan arahan ini merupakan salah arah serius. Hakim perbicaraan juga gagal untuk menerima pihak pendakwaan untuk meletakkan
- D milikan ke atas perayu (lihat perenggan 67–70).]
- E

Notes

For cases on failure to consider all evidence, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2462–2464.

F

Cases referred to

Davendar Singh a/l Sher Singh v Pendakwa Raya [2012] MLJU 321; [2012] 3 MLRA 116, CA (refd)

- G *Ooi Chee Seong & Anor v Public Prosecutor* [2014] 3 MLJ 593, CA (refd)
Seyedalireza Seyedhedayatollah Ehteshamiardestani v Public Prosecutor [2014] 6 MLJ 408; [2014] 4 CLJ 406, CA (refd)

Ugonna Philip Nwankwo v Public Prosecutor [2016] 4 MLJ 244; [2016] 2 CLJ 247, CA (refd)

H

Legislation referred to

Dangerous Drugs Act 1950 ss 2, 37(d), (da), 37A, 39B(1)(a), First Schedule

- I **Appeal from:** Criminal Trial No 45A-[15–16]–02 of 2014 (High Court, Shah Alam)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.

Thangavelu A Suppiah (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zakaria Sam JCA:**A****BACKGROUND**

[1] The appellant was convicted and sentenced to death by the Shah Alam High Court for the following two charges under s 39B(1)(a) of the Dangerous Drugs Act 1950 ('the Act'):

B

(a) for trafficking in 1863g of cannabis committed on 28 July 2013 at about 12.30pm at Jalan PJS 10/11, Sunway Mentari, Sg Way, Petaling Jaya ('the first charge'); and

C

(b) for trafficking in 953g of cannabis committed on 28 July 2013 at about 1.30pm at No 1703 Block C, Pangsapuri Ridzuan, Jalan PSJ 10/11, Bandar Sri Subang, Subang Jaya ('the second charge').

[2] Aggrieved by the said decision the appellant filed this appeal.

D**PROSECUTION CASE**

[3] On 28 July 2013, acting on information received, ASP Mohd Sahar bin Mohd Yunus ('SP3') led a police party to Pangsapuri Ridzuan. They arrived at about 11.30am and kept observation and surveillance outside the said condominium block. About 45 minutes later, SP3 saw the appellant walking out from the block. He had a Ducati bag ('P23') with him. SP3 and his men approached the appellant and detained him. The appellant looked shocked.

E**F**

[4] Upon searching the bag, SP3 found there was a plastic bag inside, containing two slabs of cannabis which formed the subject matter of the first charge. SP3 also found in the Ducati bag a wallet which contained the identity card, driving licence and Maybank card belonging to the appellant — see search list ('P4') at p 281 of AR Vol 3.

G

[5] From the appellant's right trouser pocket SP3 found a key. SP3 said he administered a statutory caution under s 37A of the Act on the appellant. It was SP3's version that the appellant said the key was to his house and also '... ada lagi barang dekat dalam bilik saya'.

H

[6] The appellant brought the police party to the said condominium described in the second charge. They gained entry to the said premise using the said key. SP3 was brought to the appellant's room. In the room SP3 asked the appellant about the 'barang'. The appellant showed a cupboard. SP3 opened the cupboard and found a dried vegetable slab placed on top of an Adidas shoe

I

A box. In the shoe box SP3 found a cutting board and a knife. The appellant's passport was also found in the cupboard. The slab formed the subject matter of the second charge.

B [7] SP3 later went to the other room in the condominium and found one Malay man by the name of Aqil Rashad ('SP2') who had just woken up from sleep and one lady ('Zuraidah') in the room. Later SP3 brought all the exhibits and the appellant together with SP2 and Zuraidah to the Damansara Police Station.

C [8] Then SP3 listed all the seized items as in P4 and P14 and marked the exhibits in front of SP5. Later SP3 handed over the appellant, SP2, Zuraidah and all the seized items to the investigating officer, Insp Nor Asmas ('SP5').

D [9] SP5 subsequently sent the suspected drug exhibits to the chemist, Vanitha d/o Gunalan ('SP1') for analysis. SP1's reports in exhs P10 and P20 and her testimony confirmed the drug to be cannabis, a dangerous drug listed in the First Schedule of the Act with a net weight of 929g and 934g (subject matter in the first charge) and 953g (subject matter in the second charge).

E [10] The real estate agent, Tan Swee Chu ('SP4') confirmed that the condominium was rented by the appellant at the time of the arrest.

FINDING AT THE END OF PROSECUTION CASE

F [11] The appellant was caught carrying the drugs in the bag and his personal items were found in the bag, signifying his knowledge of the contents of the bag.

G [12] For the drugs found in the room the personal belongings of the appellant including his clothing were found in the cupboard.

H [13] It was held that the charge against the appellant was proven on a prima facie basis independent of the presumptions under s 37(d) or s 37(da) of the Act as possession had been proven by direct evidence. The trial judge called upon the appellant to enter his defence.

DEFENCE CASE

I [14] On oath, the appellant testified that he hails from Kuching, Sarawak and has been in Kuala Lumpur since 2009 pursuing a Bachelor's Degree in Mass Communications and Media at the Taylors University Collage.

[15] He initially lived in Suria Mas Condominium in Sunway before moving

to the Pangsapuri Ridzuan in February, 2013. He entered into a tenancy agreement for a term of one year at a monthly rental rate of RM1,200 per month which was to have expired on 31 January 2014 ('exh P21').

A

[16] There were two rooms at the said Pangsapuri Ridzuan, of which, he occupied the master bedroom and rented out the second room to SP2 and his then fiancée, Zuraidah for RM600 per month.

B

[17] He testified that his then girlfriend, one Zainora ('Nora') often stayed with him at the said condominium particularly from Thursdays to Sundays and as such, left her belongings namely her clothes, make up and bags in his room.

C

[18] SP2 was a university mate of his and Nora is the sister of Zuraidah.

D

[19] He also had a friend by the name of Jonathan ('Joe') who used to live in Suria Mas Condominium. Joe was a Chinese man who was also from Kuching.

[20] Joe's tenancy at Suria Mas Condominium expired in the middle of 2013 and he was interested to take over the tenancy of the appellant at Pangsapuri Ridzuan thereafter.

E

[21] The appellant was agreeable to the said arrangement as he had decided to leave Pangsapuri Ridzuan and stay with his brother in law at Bayu Puteri Condominium from August 2013. SP4 informed him to get somebody to take over his tenancy at Pangsapuri Ridzuan, failing which, he would lose his deposit.

F

[22] Pursuant to the arrangement described above, Joe moved his belongings to the room of the appellant at Pangsapuri Ridzuan two weeks prior to the date of his arrest and shared the said room with the appellant.

G

[23] The appellant identified various belongings of Joe which can be seen from two of his suitcases visible in photograph P13(11) and that Joe had used part of the wardrobe in his room to store his clothes.

H

[24] At the time Joe moved in, Nora seldom came over.

I

[25] On the day of his arrest, he woke up at approximately 7am and went downstairs. While eating downstairs, Joe joined him at approximately 8am. Joe was seen holding a black Ducati bag ('P23').

- A [26] Both he and Joe went back upstairs to his unit at approximately 9am and watched tv, checked emails etc.
- B [27] At approximately 11.30am, Joe requested the appellant to do him a favour by handing over the said Ducati bag to a woman by the name of Lilo who was waiting in a silver Caldina outside the condominium as Joe had to see somebody upstairs.
- C [28] He did not suspect anything amiss and acceded to Joe's request after which, he made his way, with the said Ducati bag, outside to meet Lilo.
- D [29] He saw a silver Caldina outside and approached it and was suddenly apprehended by a plain clothed person who grabbed him from his back and asked him what he was carrying after which, another three or four such persons ambushed him. He was shocked.
- E [30] The said person later identified himself as a police officer and asked him what was in the bag.
- F [31] As the said bag was closed and tied in a knot, the appellant informed the said officer that he did not know what was in the bag as Joe had given it to him to be given to Lilo.
- G [32] The appellant was then taken into the Caldina by the said officers, in which there was a woman seated therein.
- H [33] One of the officers then asked him where Joe was and he said he was still in the building. They then proceeded to the appellant's unit.
- I [34] The appellant maintained he did not bring his wallet and house keys with him as he had left his main door unlocked since he was only going downstairs for a short while.
- [35] At his unit upstairs, the appellant, SP2 and Zuraidah were taken to the master bedroom and asked to sit on the master bed, after which, one of the officers, Kpl Jamil entered the room and began searching. SP3 did not conduct the search.
- [36] Kpl Jamil took almost an hour searching the entire room while the three of them were handcuffed on the bed. Jamil recovered an Adidas box and opened it and discovered drugs therein.

[37] After the said drugs were discovered, all the three of them were taken to the living room where there was a Nigerian man handcuffed, after which, they were all assaulted except for Zuraidah.

A

[38] The appellant denied knowledge of the contents of the said Ducati bag and ever seeing the contents of the said Adidas box until it was shown to him by Kpl Jamil.

B

FINDING AT THE END OF DEFENCE CASE

[39] The learned trial judge held that the appellant was caught red handed with the bag containing the cannabis and by the amount of drugs the only reasonable inference that could be drawn was that the appellant was carrying the drugs for the purpose of trafficking.

C

[40] For the drugs found in the cupboard it was clearly within the control of the accused as he kept his clothing in the cupboard. Anyone who had control of the cupboard would have knowledge of the drugs. At that point of time the appellant was in control of the room and the cupboard.

D

[41] The trial judge concluded that the prosecution had proven both the charges against the appellant beyond reasonable doubt. The appellant was found guilty of both the charges and sentenced him to death by hanging for each charge.

E

THE APPEAL

F

[42] The appellant canvassed two grounds in his appeal.

Contradicting findings

G

[43] It was submitted by learned counsel that there was no certainty with regard to the findings made by the learned trial judge. The findings at the end of the prosecution's case contradicted with the findings at the end of the defence case and in his written grounds.

H

[44] At the end of the prosecution's case, the prima facie ruling was that there was possession and the trial judge invoked the presumption of trafficking without mentioning the provision but obviously referring to s 37(da) — see pp 116–117 AR Vol 2.

I

[45] At the end of the defence case, the trial judge found that there was possession for purpose of trafficking without reference to the trafficking

A presumption. The trial judge ruled that the appellant had failed to raise a reasonable doubt to the prosecution's case — see p 159 AR Vol 2. If the judge was referring to trafficking under s 2 of the Act, then the trial judge erred in not specifying the act of trafficking.

B [46] In the written grounds of judgment with regard to his finding whether there was a prima facie case, the trial judge did not rely on the trafficking presumption. This is what the trial judge said:

C It was therefore my decision that at the end of the prosecution's case the charge against the accused was proven on a prima facie basis independent of the presumptions contained under s 37(d) or s 37(da) of the Dangerous Drugs Act. The prosecution could still avail themselves of the presumption of trafficking under the Dangerous Drugs Act if they so wished as possession had been proven by direct evidence. Being so satisfied I called upon the defence of the accused.

D which contradicted his previous finding made at the end of the prosecution's case.

E [47] Learned counsel submitted that there are two serious infirmities arising from the contradictory positions taken by the learned trial judge, namely:

- F (a) that the appellant was prejudiced as a result of the contradictory positions taken; and
- (b) if s 37(da) presumption had been invoked there was no separate finding at the end of the defence case whether the same had been rebutted.

G [48] Learned counsel further submitted that there was no certainty with regard to the issue of trafficking whether it was a case of presumed trafficking under s 37(da) or a direct trafficking under s 2 of the Act. Learned counsel cited the decision of this court in *Syedalireza Syedhedayatollah Ehteshamiardestani v Public Prosecutor* [2014] 6 MLJ 408; [2014] 4 CLJ 406 and *Ugonna Philip Nwankwo v Public Prosecutor* [2016] 4 MLJ 244; [2016] 2 CLJ 247 to support his argument that the appellant was prejudiced by the contradictory findings of the trial judge. The convictions are not in accordance with law, and ought to be said aside.

H *No judicial appreciation of the defence case*

Defence of the appellant can be summarised as follows.

I The first charge — the cannabis in the Ducati bag ('P23')

[49] Firstly, his defence was that he was doing a favour for Joe to hand over the Ducati bag to his lady friend, Lilo who was waiting in a silver Caldina car parked outside the condominium block. SP5 had confirmed in

cross-examination that the appellant had mentioned about Joe and Lilo in his statement and that the bag was to be given to Lilo (see pp 112–113 AR Vol 2).

A

[50] Secondly, Joe was the actual trafficker. SP2 had confirmed that he had seen Joe that morning in the apartment with a Ducati bag.

B

[51] The trial judge had failed to determine whether Joe was a real person and if so, whether Joe was the actual trafficker.

The second charge — the cannabis in the room

C

[52] With regard to Joe, SP2 confirmed (i) that Joe had got keys to both the condominium as well as keys to the room in question — see p 68 AR Vol 1; (ii) that Joe was supposed to move in and Joe had brought a few bags of things to the room — see pp 47 and 38 AR Vol 1; and (iii) that on the morning of the day of the police raid he saw Joe — see p 48 AR Vol 1, and he said ‘hi’ to Joe and Joe had a bag with him, similar to the Ducati bag — see p 69 AR Vol 1.

D

[53] Learned counsel submitted SP2’s evidence strongly corroborated the appellant’s defence that others too had access to the room and such person could have concealed the cannabis in the shoe box. The trial judge was therefore in error when he said that the appellant had custody of the room, cupboard and the cannabis. The trial judge had erred by not giving any weight to his evidence at all. This non-direction therefore amounts to a serious misdirection. Had this evidence being considered there would be no prima facie case for the second charge.

E

F

OUR DECISION

The contradicting findings by the trial judge

G

[54] In the note of proceedings at the end of prosecution’s case, the trial judge had clearly stated that (at pp 116–117 AR Vol 2):

Dan daripada keterangan raiding officer adalah untuk tuduhan pertama adalah jelas bahawa pada masa dan tarikh tuduhan berkenaan, tertuduh ini telah menyandang satu beg yang tulisan Ducati yang mana dalamnya telah terdapat bungkusan balutan yang disyaki dadah ganja. Selain daripada itu terdapat dompet tertuduh, dompet yang mengandungi kad pengenalan dan lesen memandu tertuduh di dalam beg tersebut. Atas perkara ini, selain daripada itu, pihak, Raiding Officer juga telah menyatakan apabila buka beg itu sahaja boleh bau dadah tersebut. Jadi atas faktor-faktor ini saya berpuas hati bahawa tertuduh ada milikan ke atas dadah tersebut. Iaitu custody control dan juga pengetahuan tentang dadah tersebut dalam beg. Selain daripada itu, maknanya ada full (sic), jumlah besar dadah itu menimbulkan andaian inferens of trafficking. Selain daripada itu presumption trafficking juga terpakai oleh kiraan jumlah yang terdapat dalam beg tersebut.

H

I

- A Untuk tuduhan kedua juga saya mempercayai keterangan Raiding officer bahawa perjumpaan dadah dalam bilik yang diduduki oleh tertuduh ini adalah atas maklumat yang diberikan oleh tertuduh ini sendiri. Daripada ini menunjukkan bahawa dan juga terdapat selain daripada dadah itu juga terdapat passport tertuduh dalam almari tersebut dan saya berpuas hati bahawa berdasarkan fakta-fakta ini
- B tertuduh ada milikan ke atas dadah yang dijumpai dalam almari dalam apartment tersebut. Dan juga presumption trafficking juga terpakai dalam kes ini. Jadi keputusan saya adalah pihak pendakwa telah berjaya membuktikan satu kes prima facie terhadap kedua-dua tuduhan terhadap tertuduh dan tertuduh di arah dipanggil untuk membela diri.
- C [55] The trial judge emphasised further in his written judgment (at p 12 of AR Vol 1) that:
- D For the finding of the drugs in the bag carried by the accused, the proximity of the accused to the drugs should be taken into consideration. In case of cannabis a judicial notice can be taken that the plant material emanates a smell strong enough for anyone to detect especially in an enclosed place as the bag. Furthermore the accused personal items were found in the bag signifying his knowledge of the contents of the bag.
- E [56] And at p 14 of his judgment the trial judge had this to say:
- F It was therefore my decision that at the end of the prosecution's case the charge against the accused was proven on a prima facie basis independent of the presumptions contained under s 37(d) or 37(da) of the Dangerous Drugs Act. The prosecution would still avail themselves of the presumption of trafficking under the Dangerous Drugs Act if they so wished as possession had been proven by direct evidence ...
- G [57] The ruling by the trial judge is clear, that mens rea possession had been proven by direct evidence. Due to the large amount of drugs found in the bag, presumption of trafficking under s 37(da) was invoked.
- H [58] It is clear that the complaint by learned counsel that the trial had given contradictory findings, is without merit.
- I [59] On the issue that there was no separate finding at the end of the defence case whether the trafficking had been rebutted and that no judicial appreciation of the defence case, we will deal with these two overlapping issues together.
- The first issue — drugs found in the bag*
- [60] The finding of the trial judge at the end of the defence case is clear, when he concluded that (at pp 18–19 of AR Vol 1):

- In evaluating the defence it is pertinent to note that the accused did not deny that he was carrying the Ducati bag. He however claimed that the bag was given by his friend to be given to a person in a car. It is difficult to believe that any person whether a friend or not, will give to someone else such incriminating and valuable items to be passed to another person. Further even if it was true the bag was given by his friend surely the first reaction of the accused on being stopped by the police would be to plead his innocence rather than meekly follow the police to his room.
- Even more important the accused could not explain the presence of his personal items in the bag apart from accusing the police of planting the items in the bag. On this allegation I chose to believe the testimony of SP3 that the personal items were in fact found in the bag.
- Viewing the entire testimony from the time the police receiving the tip off and carrying out the surveillance and arrest the picture that clearly emerges is that the accused was caught red handed with the bag containing the cannabis. No amount of explanation or defence by the accused could distort this picture. The accused was clearly in possession of the drugs and looking at the amount of drugs the only reasonable inference that could be drawn was that the accused was carrying the drugs for purposes of trafficking.'
- [61] Clearly, the complaint by learned counsel is without merit.
- [62] Having scrutinised the record with care, we are satisfied that the evidence against the appellant in the first charge is entirely overwhelming.
- Conclusion
- [63] On these grounds as discussed, we found the conviction in respect of the first charge is safe. We therefore affirmed the conviction and sentence in respect of the first charge.
- The second charge — the cannabis in the room*
- [64] The defence of the appellant is that he had no knowledge of the presence of the cannabis in the wardrobe as he was not the sole occupant as others, including Nora and Joe had access to the room as well. Nora, his girlfriend, would come and visit him from time to time, especially on the weekends. In fact Nora's passport was also found in the cupboard and she too, had clothes in the cupboard.
- [65] Joe was a friend, a fellow Sarawakian, and was supposed to take over the tenancy of his room. In fact, Joe had moved some of his belongings to his room and had shared the room with him prior to the police raid.
- A
- B
- C
- D
- E
- F
- G
- H
- I

A [66] The learned trial judge convicted the appellant for the second charge primarily on the basis that the appellant had control of both the room and the cupboard.

B [67] We agree with learned counsel that in the assessment of the defence of the appellant on the second charge, the trial judge had not considered the evidence of SP2 ('Aqil Rasyad') wherein many part of his evidence he had spoken in favour of the defence. The relevant evidence are:

C (i) that the room was accessible to both Nora and Joe. SP2 confirmed (a) Nora had slept over in the room, on weekdays and weekends, she had things like, clothes and make up set in the room — see p 46 AR Vol 1; (b) Nora's passport was also found in the cupboard — see p 60 AR Vol 1; and (c) that he told the police that Nora also stayed there — see p 62 AR Vol 1; and

D (ii) with regard to Joe, SP2 confirmed (a) that Joe had got keys to both the condominium as well as keys to the room in question — see p 68 AR Vol 1; (b) that Joe was supposed to move in and Joe had brought a few bags of things to the room — see pp 47–48 AR Vol 1; and (c) that on the morning of the day of the police raid he saw Joe — see p 48 AR Vol 1, and he said 'hi' to Joe.

F [68] SP2 is an important witness. He stayed in the condominium with his wife. Nora is his sister-in-law. He knew Joe. He had witnessed the police search in the room and was called as a prosecution witness. His evidence strongly corroborates the defence of the appellant that others too had access to the room and as such could have concealed the cannabis in the shoebox. The learned trial judge was therefore in error when he said that the appellant had custody of the room, cupboard and the cannabis.

G [69] We agree with the submission of learned counsel that the trial judge had erred by not giving any weight to SP2's evidence at all. This non-direction therefore amounts to a serious misdirection: *Davendar Singh all Sher Singh v Pendakwa Raya* [2012] MLJU 321; [2012] 3 MLRA 116.

H [70] The learned trial judge also failed to recognise that the prosecution had not excluded both Joe and Nora in order to pin possession on the appellant: see *Ooi Chee Seong & Anor v Public Prosecutor* [2014] 3 MLJ 593.

I Conclusion

[71] Based on the above ground, the conviction on the second charge cannot stand and we set aside the conviction and sentence. We acquitted and discharged the appellant of the second charge.

Conviction and sentence on the charge of trafficking 1,863g of cannabis affirmed; conviction and sentence on the charge of trafficking 953g of cannabis set aside, appellant acquitted and discharged on that charge.

Reported by Ashok Kumar

A

B

C

D

E

F

G

H

I